In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 1021

HANDELSVENNOOTSCHAP NORMA N.V., ET AL.,
PETITIONERS

v.

ROBERT F. KENNEDY, ATTORNEY GENERAL OF THE UNITED STATES, AS SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

The instant petition raises the same question which was presented in *N.V. Handelsbureau La Mola* v. *Kennedy*, 299 F. 2d 923 (C.A.D.C.), certiorari denied, 370 U.S. 940—whether a Netherlands corporation, which admittedly was an "enemy" under Section 2(a) of the Trading With the Enemy Act during hostilities and the German occupation of the Netherlands, continued to be an "enemy" after the occupation terminated, and is therefore precluded from maintaining an action under Section 9(a) of the Act for return of property vested by the United States in 1946 and 1947.

731-285—64

Petitioners are Netherlands corporations which were resident and doing business in enemy-occupied Holland during World War II (J.A. 2, 64).[1] The bulk of their property in the United States was vested by the Alien Property Custodian as enemy property during the German occupation of Holland (J.A. 55–62); the remainder was vested after the termination of actual hostilities (J.A. 83–92) but before the ending of the state of war. Only these so-called "late" vestings are in issue in the present actions.[2]

Although the present suits were instituted in 1949 (Bank voor Handel, J.A. 2–8; Norma, J.A. 64–69), they were stayed pending disposition of administrative claims for return of the vested property which were filed with the Alien Property Custodian pursuant to Section 32 of the Trading With the Enemy Act, 50 U.S.C. App. 32 (J.A. 25–26). The administrative claims were disallowed on February 13, 1959, by the Office of Alien Property, which ruled that petitioners were beneficially owned by a Hungarian national residing in Switzerland, Baron Heinrich Thyssen-Bornemisza; that Thyssen-Bornemisza, acting through a general agent, had engaged in extensive wartime business operations in Germany; and that

[1] Citation is to the Joint Appendix in the court of appeals which has been filed with the Clerk of this Court.

[2] The vestings during World War II were subject to a prior suit, *sub nom. Bank voor Handel en Scheepvaart, N.V.* v. *Kennedy*, 288 F. 2d 375 (C.A.D.C.), certiorari denied, 366 U.S. 962. The late vestings are expressly authorized by the congressional resolution terminating the state of war between the United States and Germany. 65 Stat. 451, 50 U.S.C. App. note preceding § 1.

petitioners were "enemy-tainted" because of the enemy character of their owner. This administrative determination is final and non-reviewable. *Schilling v. Rogers*, 363 U.S. 666.

Having failed in the administrative proceedings, petitioners pursued their suits under Section 9(a) of the Trading With the Enemy Act, 50 U.S.C. App. 9(a), which authorizes the district courts to entertain proceedings for the return of property vested after the termination of hostilities.[2] Section 9(a), however, permits suit only by persons who are not enemies or allies of enemies.[3] The term "enemy," in turn, is defined in Section 2(a), 50 U.S.C. App. 2(a), to include a person or corporation of any nationality "resident within the territory (including that occupied by the military and naval forces) of any nation with which the United States is at war," and a corporation organized or doing business "within such territory." Upon the authority of its decision in *La Mola*, the court below held that petitioners were enemies under the Act and therefore without standing to sue under Section 9(a). Accordingly, it affirmed the judgment of the district court dismissing the complaint. There is no cause for further review of the issue which this Court declined to review only two Terms ago.

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[1] The administrative decision is reprinted in Appendix B to the government's brief in *Bank voor Handel en Scheepvaart, N.V. v. Kennedy*, No. 958, October Term, 1960.

[2] Those without standing to sue in court may pursue an administrative remedy under Section 32 of the Act. As noted, petitioners have pursued this remedy to a final decision that they are enemy-tainted and therefore not entitled to the return of their property.

Faced with these unequivocal statutory provisions and a settled line of decisions applying them in accordance with their plain terms,[5] petitioners urge (Pet. 6–7) that the statute is unconstitutional if deemed to preclude, after a state of war has been officially terminated, a judicial action to recover property vested after enemy occupation had ceased, where the pre-vesting owner was merely a "technical enemy"—*i.e.*, an "enemy" by virtue of enemy occupation of the territory in which he resided. The very same contention has been raised and rejected in a number of previous cases in which the Court has denied petitions for review.[6]

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[5] See *N.V. Handelsbureau La Mola* v. *Kennedy*, 299 F. 2d 923 (C.A.D.C.), certiorari denied, 370 U.S. 940; *Bank Voor Handel En Scheepvaart, N.V.* v. *Kennedy*, 288 F. 2d 375 (C.A.D.C.), certiorari denied, 366 U.S. 962; *Kennedy* v. *Christiani-Onken*, 301 F. 2d 546 (C.A.D.C.), certiorari denied, 371 U.S. 828; *Kennedy* v. *Rommel and DeCourten*, 301 F. 2d 544 (C.A.D.C.), certiorari dismissed, 371 U.S. 882; *Hansen* v. *Brownell*, 234 F. 2d 60 (C.A.D.C.). Cf. *Schrijver* v. *Sutherland*, 19 F. 2d 688 (C.A.D.C.), certiorari denied, 275 U.S. 546. But see *Willenbrock* v. *Rogers*, 255 F. 2d 236 (C.A. 3).

[6] *E.g.*, *N.V. Handelsbureau La Mola* v. *Kennedy*, 299 F. 2d 923 (C.A.D.C.), certiorari denied, 370 U.S. 940; *Kennedy* v. *Rommel and DeCourten*, 301 F. 2d 544 (C.A.D.C.), certiorari denied, 371 U.S. 882; *Kennedy* v. *Christiani-Onken*, 301 F. 2d 546 (C.A.D.C.), certiorari denied, 371 U.S. 828.

As pointed out in our brief in opposition in *La Mola* (No. 907, Oct. Term 1961, pp. 12–14), even if the statutory remedy should be deemed constitutionally inadequate, the conclusion is not that Section 9(a) may be rewritten to give petitioners a right to sue in the district court, but, rather, that petitioners should have proceeded in the Court of Claims by way of suit for just compensation based upon the Fifth Amendment. See *Cities Service Co.* v. *McGrath*, 342 U.S. 330, 335; *Silesian-American Corp.* v. *Clark*, 332 U.S. 469, 479–480; *Russian Volunteer Fleet* v. *United States*, 282 U.S. 481.

Petitioners suggest (Pet. 6) that the "Constitutional principles" which the Court stated in the *Interhandel* case (*Societe Internationale* v. *Rogers*, 357 U.S. 197) require that they be afforded a judicial determination of the propriety of the seizure of their property. No such rule was laid down in *Interhandel*. That case did not involve a company which was an "enemy" by definition. It turned on the power of the federal courts to enforce discovery orders under the Federal Rules of Civil Procedure. Past decisions establish that denying a person recovery of vested property is not a deprivation of property without due process when the claimant is found to be an enemy. *United States* v. *Chemical Foundation*, 272 U.S. 1, 11; *Stoehr* v. *Wallace*, 255 U.S. 239, 245. *A fortiori*, one who admittedly falls within the definition of an "enemy" is not denied due process by being given an exclusive administrative remedy.

2. Petitioners' alternate contention is equally without merit. It is urged that Article V of the 1956 Treaty of Friendship, Commerce and Navigation with the Netherlands[1] guarantees to Netherlands companies the same access to United States courts as is enjoyed by United States companies. In essence, petitioners contend that the treaty, *pro tanto*, amends the Trading With the Enemy Act so as to permit Netherlands citizens access to the courts even if found to be enemies. This very interpretation of the treaty was repeatedly urged through diplomatic channels and rejected by the Department of State; it was raised in *Bank voor Handel en Scheepvaart, N.V.* v. *Ken-*

[1] T.I.A.S. 3942, 8 U.S.T. 2043.

nedy, supra, 288 F. 2d at 376, and rejected; and it was reiterated without success in the petition for certiorari in that case, both by the petitioner and by the Ambassador of the Netherlands (No. 958, October Term, 1960).

In sum, the questions presented here have repeatedly been decided adversely to the position urged by the petitioners. They are of no public importance at this late stage in the administration of the alien property program. Accordingly, there is no occasion for further review.

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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